

PP v. INDUK HARAPAN SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
 STEPHEN CHUNG J
 [CRIMINAL APPLICATION NO: BKI-44-15-11-2012]
 3 FEBRUARY 2015

CRIMINAL LAW: *Money laundering – Offences of money laundering – Anti-Money Laundering and Terrorist Financing Act 2001, s. 4(1) ('Act') – Evading customs duties – Monies obtained as result of money laundering – Application by public prosecutor to forfeit monies seized under Act – 12-month period prescribed in s. 56(1) of Act – Whether compliance of time period mandatory*

CUSTOMS AND EXCISE: *Forfeiture – Forfeiture of monies seized – Application for – Monies obtained as result of money laundering – Whether application for forfeiture filed outside the 12-month period required – Whether there was no application for extension of time – Whether application competent – Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 56(1)*

The respondent was operating a licensed public warehouse in Sandakan and Tawau which were used for storage of dutiable goods including beers in which the payment of duties and taxes were deferred until the goods were taken out for local consumption or exported. It transpired that the first respondent had fraudulently evaded customs duties. Therefore, pursuant to several orders dated 19 August 2011 made under s. 50(1) of the Anti-Money Laundering and Terrorist Financing Act 2001 ('Act'), the public prosecutor ('PP') seized 14 bank accounts being the subject matters of an offence under s. 4(1) of the Act. It was contended that the monies had been obtained as a result of or in connection with smuggling activities carried out by the respondents. However, the PP did not institute any prosecution against any of the respondents for any offence and none of them had been convicted for any offence under the Act or under the Customs Act 1967. Subsequently, the PP applied to forfeit the monies in the 14 bank accounts pursuant to ss. 56(1) and 61(2) of the Act. Section 56(1) of the Act however, required the application to be made before the expiration of 12 months from the date the property was frozen or seized. If no application was made, then at the expiration of the 12 months, the property was required by s. 56(3) of the Act to be released to the person from whom it was seized. In the instant case, the application to court for the order of forfeiture was only filed after 12 months had expired from the date the respondents' accounts were frozen.

Held (dismissing application):

- (1) The bank accounts were seized on 19 August 2011. This application for forfeiture was dated 28 August 2012 and filed in court on 28 August 2012, outside the 12-month period as required. There was no application by PP for extension or abridgment of time or for leave to file

- A the application out of time. There was ample time for the PP to prosecute or to apply to forfeit the monies in the 14 bank accounts within 12 months from 19 August 2011 but had failed to do so. No explanation was given for the delay or failure to file the 'notis usual' within time. Therefore, the application was not competent. The
- B provisions of s. 56 of the Act mandate that the application to forfeit the seized property must be made within 12 months and at the expiration of the 12 months the property must be released to the person from whom it was seized. Therefore, the application was dismissed and the monies in the 14 bank accounts be released to the persons from whom they were
- C seized. (paras 14-16)

Case(s) referred to:

PP v. Dragcom Sdn Bhd & Ors and Other Applications [2013] 5 MLJ 594 (*refd*)

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4(1), 50(1), 56(1), (3), 61(2)

D Customs Act 1967, s. 135(1)(g)

For the prosecution - Ida Masliza Maarof; DPP

For the defendant - Rahimah Majid; M/s RM Jarin & Co

- E *Reported by Sandra Gabriel*

JUDGMENT

Stephen Chung J:

- F [1] By a notis usual dated 28 August 2012, the Public Prosecutor (PP) applied to forfeit the moneys in fourteen (14) bank accounts in Labuan and Kota Kinabalu pursuant to s. 56(1) and s. 61(2) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (referred to as the Act).
- G [2] Pursuant to several orders dated 19 August 2011 made under s. 50(1) of the Act, the PP seized the 14 bank accounts being the subject matters of an offence under s. 4(1) of the Act.
- H [3] The PP informed the court that there were mistakes or typing errors in the numbering of the paragraphs in the application so that the paragraphs are not in running sequence. The application is supported by the affidavit of DPP Mohd Farez bin Rahman (DPP), affidavit of Penguasa Kastam (PK) Al Azri bin Abdullah (PK) and the affidavit of Mohd Riduan bin Jantan, all affirmed on 16 August 2012. The respondents filed an affidavit in opposition affirmed by the second respondent on 7 January 2013.
- I [4] PK Al Azri affirmed that on 8 June 2011 he was instructed to open an investigation file in respect of the first respondent under s. 135(1)(g) of the Customs Act 1967. In paras. 6 and 7 of his affidavit, he affirmed that the first respondent was operating a licensed public warehouse (LPW) in

Sandakan and Tawau which were used for storage of dutiable goods including beers in which the payment of duties and taxes were deferred until the goods were taken out for local consumption or exported.

[5] He said the first respondent imported the beers from Harcros Trading Pte Ltd on behalf of Shencourt Land Cooperation of Zamboanga City and CV Harapan Mulia of Indonesia, to be kept in the LPW and subsequently to be exported to the Philippines and Indonesia. He said that based on his investigation the beers stored at the LPW were taken out from the stores but not loaded onto vessels although they were to be exported (see paras. 8 to 59 and the exhibits attached).

[6] He contended that a serious offence had been committed by the first respondent and had gained substantial benefits from its unlawful activities. He contended that the first respondent had acquired, used, possessed or disposed the proceeds obtained from carrying on business by fraudulently evading customs duties. He prepared a report on his investigation which is one page containing two paragraphs only: see exh. "RJ-1" attached to the affidavit of Mohd Riduan Bin Jantan.

[7] The DPP referred to paras. 5 to 34 of the affidavit of Mohd Riduan who had listed the accounts seized from the respondents and subsequently published in the gazette under the Act.

[8] On 28 June 2013, the notice was published in the gazette pursuant to a court order under s. 61(2) of the Act for any third party who claimed to have an interest in the moneys or bank accounts to come forward to show cause why the moneys or bank accounts seized should not be forfeited.

[9] The PP did not institute any prosecution against any of the respondents for any offence and none of them has been convicted for any offence under the Act or under the Customs Act 1967. However it contended that the moneys had been obtained as a result of or in connection with smuggling activities carried out by the respondents. The PP accordingly applied under s. 56(1) of the Act that the moneys in the 14 bank accounts be forfeited because they had been obtained as a result of or in connection with an offence of money laundering under s. 4(1) of the Act.

[10] Under s. 56(1), in respect of any property frozen or seized under the Act where there is no prosecution or conviction for an offence under sub-s. 4(1) or a terrorism financing offence, the PP may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under sub-s. 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

[11] Section 56(2) states that the judge to whom an application is made under sub-s. (1) shall make an order for the forfeiture of the property if he is satisfied that:

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- A (a) the property is the subject matter of or was used in the commission of an offence under sub-s. 4(1) or a terrorism financing offence or is terrorist property; and
- (b) there is no purchaser in good faith for valuable consideration in respect of the property.
- B [12] Under s. 56(3) any property that has been seized and in respect of which no application is made under sub-s. (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
- C [13] The bank accounts were seized on 19 August 2011. This application for forfeiture was dated 28 August 2012 and filed in court on 28 August 2012, outside the 12 month period as required. There was no application by PP for extension or abridgment of time or for leave to file the application out of time. There was no application by PP on the ground that
- D notwithstanding not having observed some formality or some requirement of the provisions of the Act that the *notis usul* should be heard or allowed in order that substantial justice be done in the matter.
- E [14] The facts showed that PP commenced investigation against the respondents on 8 June 2011 and the 14 bank accounts were seized on 19 August 2011. There was ample time for the PP to prosecute or to apply to forfeit the moneys in the 14 bank accounts within 12 months from 19 August 2011 but failed to do so. No explanation was given for the delay or failure to file the *notis usul* within time. Therefore the application is not competent: see *PP v. Dragcom Sdn Bhd & Ors and Other Applications* [2013] 5
- F MLJ 594.
- G [15] The provisions of s. 56 mandate that the application to forfeit the seized property must be made within 12 months and at the expiration of the 12 months the property must be released to the person from whom it was seized. This application is dismissed for the reasons given and the moneys in the 14 bank accounts be released to the persons from whom they were seized.

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